

[Thompson v. Houston Lighting & Power Co.](#), ARB No. 98-101, ALJ No. 1996-ERA-34
(ARB Mar. 30, 2001)

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



ARB Case No. 98-101
ALJ Case Nos. 96-ERA-34
96-ERA-38
DATE: March 30, 2001

In the Matter of:

RONALD A. THOMPSON,
COMPLAINANT

v.

HOUSTON LIGHTING & POWER CO.
and HOUSTON INDUSTRIES, INC.,
RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{[1](#)}

Appearances:

For the Complainant:

David K. Colapinto, Esq., Stephen M. Kohn, Esq.,
Kohn, Kohn & Colapinto, P.C., Washington, D.C.

For the Respondent:

Randy T. Leavitt, Esq., Michael Burnett, Esq.,
Minton, Burton, Foster & Collins, P.C., Austin, Texas

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act ("ERA"), as amended, 42 U.S.C. §5851 (1994).^{[2](#)} Complainant Ronald A. Thompson ("Thompson") filed a complaint with the Department of Labor claiming that

Respondent Houston Light & Power Co. ("HL&P") improperly discriminated against him on October 5, 1995, when it suspended his security access. HL&P opposed Thompson's claim on the grounds that it was covered by an ERA settlement agreement and release entered into by HL&P and Thompson on October 25, 1995. Thompson also claimed that HL&P, and its parent corporation Houston Industries, Inc., breached the settlement agreement by, among other things, refusing to produce copies of certain medical records. After an investigation, the Department of Labor administratively dismissed Thompson's complaints. Thompson requested a formal hearing and an Administrative Law Judge issued a March 11, 1998 decision recommending that we dismiss Thompson's claims. Thompson filed a timely petition for review with this Board. We agree with the ALJ and dismiss Thompson's complaints.

I. Background.

A. Thompson's prior ERA complaints.

Thompson filed a prior ERA complaint with the Department of Labor claiming that HL&P had retaliated against him because he reported nuclear safety issues which were investigated by the Nuclear Regulatory Commission ("NRC"). The Department's Wage and Hour Division investigated Thompson's complaint and concluded that HL&P had discriminated against Thompson. HL&P then requested a formal hearing. This matter was docketed as Case No. 93-ERA-2 and referred to an Administrative Law Judge ("ALJ"). Thompson filed two additional whistleblower complaints which were docketed as Case No. 95-ERA-48 and consolidated with Case No. 93-ERA-2. The presiding ALJ set the consolidated cases for hearing on October 18, 1995.

Meanwhile, Thompson was still employed by HL&P and, on October 5, 1995, HL&P declared that he was a potential safety threat. HL&P suspended his unescorted access to the protected areas of its nuclear power plant and notified the NRC of its action. HL&P also sought a psychological examination of Thompson to evaluate his medical fitness for duty. Additionally, for purposes of the damages phase of the October 18, 1995 hearing, HL&P had Thompson undergo a separate independent psychological examination. The examination was conducted by Dr. George Parker and Dr. Richard Coons. However, the consolidated cases never went to trial because, on October 25, 1995, Thompson and HL&P filed a Joint Motion for Approval of a Settlement Agreement and Dismissal with Prejudice. On December 4, 1995, the Secretary of Labor accepted the settlement and dismissed the complaints.

Among other provisions, the October 25, 1995 Settlement Agreement and Full and Final Release ("Settlement Agreement") included the following: "HL&P agrees to keep confidential Thompson's medical, security, unescorted access, and/or psychological records, including but not limited to documents related to Thompson's fitness for duty,' except as required by law or consented to by Thompson."³ Settlement Agreement ¶ 5f. The Settlement Agreement made no explicit reference to the Parker-Coons records, and contained

no express requirement that HL&P turn over any confidential documents to Thompson. However, Thompson believed that ¶ 5f entitled him to have access to the Parker-Coons records and requested that HL&P make the records available. In a January 31, 1996 letter to Thompson's attorney, HL&P declined Thompson's request stating as follows:

We are unaware of any state or federal law entitling Mr. Thompson access to the requested information, especially since the case is over. Moreover, the settlement agreement does not state that HL&P will provide Mr. Thompson with the psychological information its attorneys used as work product in the litigation.

Complainant's Exhibit 19 at 1-2. HL&P also considered the request for the reports as having been mooted by the Secretary's dismissal of the cases pursuant to the October 25, 1995 Settlement Agreement.

B. The two complaints in this case.

On April 2, 1996, Thompson filed a complaint with the Administrator of the Wage and Hour Division claiming that he suffered retaliatory discrimination, on October 5, 1995, when HL&P suspended his security access. The Occupational Health and Safety Administration (OSHA) investigated the complaint and informed Thompson, by letter dated July 3, 1996, "[t]he evidence surrounding your allegation has already been addressed in a previous investigation which was resolved by a settlement agreement between you and the Respondent. Consequently, it is determined that the allegations in this matter are no longer a chargeable issue." Thompson objected to that determination and requested a formal hearing. The matter was docketed as Case No. 96-ERA-34 and referred to an ALJ.

On June 27, 1996, Thompson filed another complaint with OSHA claiming that he suffered retaliatory discrimination when HL&P, and its parent company Houston Industries, Inc. (HII), allegedly breached the October 25, 1995 Settlement Agreement by refusing to release the Parker-Coons medical reports. The June 27, 1996 complaint states: "We hereby file this complaint against HLP . . . to supplement and amend our complaint letter of April 2, 1996." OSHA dismissed the complaint. Thompson objected to that determination and requested a formal hearing. This matter was docketed as Case No. 96-ERA-38 and referred to the ALJ who consolidated it for hearing with Case No. 96-ERA-34.

II. The ALJ's Decisions.

In his November 27, 1996 Decision and Order On Various Motions for Summary Decision⁴ the ALJ dismissed Thompson's April 2, 1996 claim that HL&P discriminated against him by suspending his security access. According to the ALJ, this claim was

barred because Thompson's access was suspended prior to the October 25, 1995 Settlement Agreement which contained a release from claims based upon events which occurred prior to the date of the Agreement.⁵

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In his March 11, 1998 Recommended Decision and Order ("R. D. & O.") the ALJ found that the data generated from the standard psychological tests administered by Drs. Parker and Coons were Thompson's "medical and/or psychological records" within the meaning of ¶ 5f of the Settlement Agreement. R. D. & O. slip op. at 21. However, the ALJ found that the reports prepared from the test data by Drs. Parker and Coons were not Thompson's medical and/or psychological records but "were expert reports prepared for opposing counsel in the context of litigation." *Id.* at 22. As such, the reports were not covered by ¶ 5f. *Id.* The ALJ also found

that Complainant failed to establish a breach of paragraph 5f of the Settlement Agreement because that paragraph does not require disclosure upon Claimant's consent. That paragraph merely permits [sic] that Respondents are no longer obliged to hold that information confidential upon Complainant's consent.

Id. at 24-25.

Finally, the ALJ analyzed whether Respondents' refusal to release the Parker-Coons records constituted a separate violation of the ERA. The ALJ found that Thompson engaged in protected activity when he contacted the NRC about the terms of the Settlement Agreement. *Id.* at 20. However, the ALJ found that Thompson failed to establish that he suffered adverse action because, as noted above, he had no right to the Parker-Coons records. In addition, the ALJ noted: "assuming *arguendo* that Respondents were required to disclose the records upon Complainant's consent, [I] nevertheless find that Complainant fails to satisfy his ultimate burden of proving intentional discrimination by a preponderance of the evidence." *Id.* at 23. Consequently, the ALJ recommended that the complaints be dismissed. This appeal followed.

III. JURISDICTION.

We have jurisdiction pursuant to 42 U.S.C.A. §5851 and 29 C.F.R. §24.8 (2000).

IV. STANDARD OF REVIEW.

In reviewing the ALJ's recommended decision, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C. §557(b) (1994). Accordingly, the Board is not bound by either the ALJ's findings or his conclusions of law, but reviews both *de novo*. See *Berkman v.*

U.S. Coast Guard Academy, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000), and the materials cited therein.

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V. DISCUSSION.

Thompson raises several issues on appeal. He asserts that he had a right to the Parker-Coons records and that HL&P's refusal to release the records constituted retaliatory adverse action.⁶ In a related argument, Thompson asserts that his inquiry to the NRC regarding the terms of the settlement agreement was protected activity under the ERA, and the ALJ erred when he found that Thompson's protected activity was not a contributing factor in Respondent's refusal to turn over the Parker-Coons records. He also argues that HL&P and HII violated the ERA by breaching the Settlement Agreement and by "considering the Parker-Coons records to be outside the scope of the Settlement Agreement." Complainant's Initial Brief (Comp. Br.) at 21. Finally, Thompson argues that the ALJ erred when he rejected Thompson's request to enforce the Settlement Agreement. Thompson's arguments that Respondents violated the ERA are unsuccessful because, having the ultimate burden of proof, Thompson failed to make his case. Additionally, Thompson's assertion that the ALJ and the Board have the authority to enforce the settlement agreement is incorrect.

A. Thompson's arguments that Respondents violated the ERA, either by refusing to turn over the Parker-Coons records, or by breaching the settlement agreement, which assertedly required that Respondents turn over the records.

In order to prevail in an ERA whistleblower case, the complainant must prove by a preponderance of the evidence that he engaged in protected activity which was "a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. §5851(b)(3)(C); *Dysert v. Florida Power Co.*, No. 93-ERA-21, slip op. at 4 (Sec'y Aug. 7, 1995) *aff'd sub nom. Dysert v. U.S. Dep't of Labor*, 105 F.3d 607 (11th Cir. 1997). If the complainant meets his burden, the employer may still prevail if it demonstrates "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [the complainant's protected activity]." 42 U.S.C. §§5851(b)(3)(D); *Makam v. Pub. Serv. Elec. & Gas Co.*, ARB No. 99-045, ALJ Nos. 98-ERA-22, 98-ERA-26, slip op. at 3 (ARB Jan. 26, 2001); *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1102 (10th Cir. 1999). Because this latter burden, which is in the nature of an affirmative defense, only arises if the complainant has proven that the respondent took adverse action **in part because of** complainant's protected activity, analysis of the evidence presented pursuant to this burden is typically referred to as "dual motive." As we discuss below, Thompson failed to prove that retaliatory motive was a contributing factor in Respondents' refusal to turn over the Parker-Coons records. For that reason neither the ALJ nor we have cause to engage in a dual motive analysis.

Thompson argues that the temporal proximity between his contact with the NRC and HL&P's refusal to turn over the Parker-Coons records raises "an inference of causation," and appears to assert that this inference requires a finding that retaliatory animus was a contributing factor in HL&P's refusal. Therefore, Thompson reasons, the ALJ erroneously failed to require the Respondents to prove by clear and convincing evidence that they would have refused to turn over the reports even if Thompson had not engaged in protected activity. Comp. Br. at 22-23. This argument is based upon a fundamental misunderstanding of the role of temporal proximity in establishing retaliatory motive. As we have said before, temporal proximity is "just one piece of evidence for the trier of fact to weigh in deciding the ultimate question whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action." *Jackson v. Ketchikan Pulp Co.*, Nos. 93-WPC-7, 93-WPC-8, slip op. at 5 (Sec'y Mar. 3, 1996); *accord Bartlik v. U.S. Dep't of Labor*, 73 F.3d 100, 103 n.6 (6th Cir. 1996) (temporal proximity by itself found insufficient to establish prima facie case). The complainant's ultimate burden is not to prove that there was temporal proximity between protected activity and adverse action. Rather, a complainant must prove that the protected activity was a contributing factor in the adverse personnel action. *See, e.g., Leveille v. New York Air Nat'l Guard*, Nos. 94-TSC-3, 94-TSC-4, slip op. at 4 (Sec'y Dec. 11, 1995) (complainant must prove, by a preponderance of the evidence, that the respondent's real motive was intentional discrimination).

Of course, temporal proximity may provide powerful evidence of retaliatory animus. However, although in the circumstances of a given case a fact-finder **might** conclude that the temporal proximity between protected activity and adverse action establishes that the adverse action was motivated by the protected activity, such a conclusion is not ineluctable. Here the ALJ determined, based upon all of the facts presented to him, that HL&P was not motivated by retaliatory animus when it refused to turn the Parker-Coons records over to Thompson. These facts included HL&P's belief that, having settled Thompson's complaint, it was under no obligation to produce the records, and that the records were subject to the attorney work product privilege. The ALJ did precisely what was required by the circumstances of this case: he weighed all of the relevant evidence regarding HL&P's motivation, including the evidence regarding temporal proximity, and determined that Thompson had not proven his case. We agree with that determination. Because Thompson failed to prove that his contact with the NRC was a contributing factor in HL&P's refusal to produce the records, the ALJ correctly declined to engage in the ERA's prescribed dual motive analysis.

For similar reasons Thompson's second argument that HL&P's refusal to turn over the Parker-Coons records was a breach of the settlement agreement, and therefore constituted a violation of the ERA must fail. For even if HL&P's refusal were a breach of the agreement (a factual issue we decline to resolve), in order for that breach to constitute unlawful retaliatory action, it was incumbent upon Thompson to prove that the refusal was motivated by retaliatory animus. As we have demonstrated above, Thompson failed in that endeavor.

B. Thompson's argument that the ALJ and the Board have the authority to enforce the settlement agreement.

One final issue merits comment. Thompson asserted before the ALJ that the Department has inherent jurisdiction over settlements approved by the Secretary. Therefore, according to Thompson, the ALJ could consider whether certain material terms in the settlement agreement were void as contrary to public policy and federal law or, in the alternative, that there was no settlement with regard to these terms because they are illegal, against public policy and, therefore, void. The ALJ essentially concluded that Thompson was seeking enforcement of the Settlement Agreement. Inasmuch as Department regulations do not provide for an administrative enforcement of a settlement agreement, the ALJ concluded that a review of these matters was beyond his jurisdiction. November 27, 1996 Decision and Order on Various Motions for Summary Decision, slip op. at 5-6.

About one year later, in an unrelated case, the Third Circuit held that the Secretary lacked authority to enforce a settlement agreement because, under the ERA, enforcement authority is vested exclusively in the U.S. district courts. *Williams v. Metzler*, 132 F.3d 937 (3d Cir. 1997). Thompson points out that, although *Williams* is binding on cases arising in the Third Circuit, it is not binding on cases arising in the Fifth Circuit. Inasmuch as his case arose in the Fifth Circuit, Thompson urges us to follow *Orr v. Brown & Root, Inc.*, Case No. 85-ERA-6 (Sec'y Oct. 2, 1985),⁷ a case in which the Secretary found that the Department does have jurisdiction to enforce a settlement agreement.⁸ Alternatively, Thompson requests that the Department initiate or join an enforcement action against Respondents for breach of the settlement agreement and notes that he has already filed a "*pro se* Complaint for Enforcement in U.S. District Court for the Southern District of Texas, Galveston Division."

In our view, the ERA makes it unequivocally clear that a settlement agreement is enforceable only through U.S. District Court. 42 U.S.C. §5851(e). Thus, we agree with the Third Circuit that the Department has no authority, either express or implied, to enforce a settlement agreement in an ERA case.

Finally, as to Thompson's request that the Secretary initiate or join an enforcement action, DOL regulations do not confer on this Board any role in the enforcement process; we therefore offer no opinion on Thompson's request.

VI. CONCLUSION.

For the foregoing reasons we accept the ALJ's recommendation and **DISMISS** these cases.

SO ORDERED.

CYNTHIA L. ATTWOOD

Member

RICHARD A. BEVERLY

Alternate Member

[ENDNOTES]

¹ This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19, 978 §5 (May 3, 1996).

² The ERA prohibits an employer from discharging any employee or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in protected activity. 42 U.S.C. §5851(a)(1); 29 C.F.R. §24.2 (2000).

³ After the Agreement had been reached Thompson contacted the NRC with a regulatory concern regarding certain language in the Settlement Agreement. By letter dated January 4, 1996, the NRC advised HL&P and Thompson that portions of the Settlement Agreement were in conflict with NRC regulations and contrary to public policy.

⁴ The ALJ issued several Recommended Decisions and Orders on the parties' Motions and Cross-Motions for Summary Decision. These are: August 19, 1997 Order Granting Respondents' Motion for Partial Summary Decision; September 16, 1997 Order Denying, In Part, Respondents' Final Motion for Summary Decision; and, September 29, 1997 Order Granting, In Part, Respondents' Final Motion for Summary Decision. The parties have not raised any objections to these Orders on appeal. Therefore, we accept the recommendations of the ALJ.

⁵ On review, Thompson does not take issue with that aspect of the ALJ's decision, and we will not discuss it further.

⁶ Thompson fails to support this assertion with any coherent argument. Because we conclude that Thompson failed to prove that Respondents acted with retaliatory animus, it is unnecessary for us to delve into the question of whether HL&P's refusal to turn over the Parker-Coons records could be considered to be an "adverse action" under the ERA.

⁷ The Secretary's decision in *Orr* was based upon *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976) (courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them). However, in *Langley v.*

Jackson State Univ., 14 F.3d 1070, 1074 (5th Cir. 1994), the Fifth Circuit specifically rejected the Sixth Circuit's holding in *Aro*.

⁸ Thompson also cites *Chase v. Buncombe County*, Case No. 85-SWD-4 (Sec'y Nov. 3, 1986). However, this case is inapposite because it was brought under the employee protection provision of the Solid Waste Disposal Act, 42 U.S.C. §6971, which does not contain a provision placing enforcement authority within the exclusive jurisdiction of the U.S. district courts.